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SUPREME COURT COPY

In the Supreme Court of the

State of California

People of the State of California,	)	No. S116307
Plaintiff and respondent,	)	
v.	)	
Alfred Flores III,	)	
Defendant and appellant.	)	

SUPREME COURT
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Appellant's Supplemental Opening Brief

Automatic Appeal From a Judgment of Death
Of the Superior Court of The State of California,
County of San Bernardino
Honorable Ingrid A. Uhler, Judge
No. FVA-015023

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DEATH PENALTY

In the Supreme Court of the

State of California

People of the State of California, Plaintiff and respondent, v. Alfred Flores III, Defendant and appellant.	)	No. S116307

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The record shows a separate ground of error in the death-qualification process: the court did not treat alike three jurors who ardently favored the death penalty and one juror who expressed reservations about it. Trial courts possess broad discretion over both decisions regarding the qualifications of prospective jurors to serve and the conduct voir dire. (*People v. Whalen* (2013) 56 Cal.4th 1, 29.) But courts must be "'be evenhanded in their questions to prospective jurors . . . and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors.' " (*People v. Mills* (2010) 48 Cal.4th 158, 189; see *Morgan v. Illinois* (1992) 504 U.S. 719, 729 [holding the "requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment" requires court to excuse a pro-

death penalty juror whose views impair his ability to return a life sentence]; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 86 [holding it was error to deny a challenge for cause to juror who made it clear he would vote automatically for death].)

Here, a comparison of the court's application of *Witt* to "pro-death" and "pro-life" jurors reveals unfairness. (*Wainwright v. Witt* (1985) 469 U.S. 412.) The court refused to dismiss jurors who said they would "probably" vote automatically for death or "could not" impose life under the circumstances of this case, but granted a challenge to S.M. based on his statement that he did not know if he could "in good conscience" vote for the death penalty. (5 RT 946.) The court questioned the ardently pro-death penalty jurors, but did not question prospective juror S.M., even though the court described the attorney questioning as "limited." (5 RT 951.) The result of the court's uneven application of *Witt* was a jury that strongly favored the death penalty.

Consider the following pro-death jurors:

L.T.: She favored the death penalty and would vote to keep it. (22 CT 6124, 6126.) She believed in an "eye for eye." She believed "you should be punished in the same way that you

punished someone else." (222 CT 6123.) She was only "somewhat" comfortable considering the aggravating and mitigating factors in deciding the proper penalty. (22 CT 6123.) She believed the purpose of the death penalty was "so that the taxpayers wouldn't have as many prisoners to help support." (22 CT 6124.) She stated "[t]here are a lot of murderers in prison and our prisons are overcrowded." (22 CT 6124.) She thought the death penalty in California was fair: "I believe people should get the death penalty if they take another person's life." (22 CT 6125.)

In voir dire, when asked if she would "automatically" vote for death if defendant was found guilty of murdering three people, she said, "Probably. I would say probably, yes." (5 RT 839.) She then equivocated, and said she was not "set" either way. (5 RT 840.) In response to the court's questions, she claimed she was "open-minded" and would not automatically vote for death. (5 RT 842.)

D.S.: He favored the death penalty and would vote to keep it. (22 CT 6014, 6013.) He agreed he would have a "hard time" imposing life without parole under the facts of this case because

the fact there were three separate killings was "kind of extreme." (5 RT 1010-11.) He believed the defendant deserved the death penalty if he killed three people. (5 RT 1012.) Under questioning by the prosecutor, Mr. S. thought he could keep an open mind: "I guess I would be as fair as I possibly could." (5 RT 1016.)

S.T.: She favored the death penalty and would vote to keep it. (22 CT 6162, 6161.) She thought if the death penalty was "used more" crime would go down. (22 CT 6161.) Her Christian religion believed in the death penalty; she said the Old Testament teaches that "if you shed the blood of someone – yours should be shed as well." (22 CT 6162.) She agreed with that. (22 CT 6162.) She stated she could "possibly" vote for life in prison if there was "remorse." (22 CT 6162.) She agreed she could consider life in prison and return such a verdict if the facts warranted it. (22 CT 6163.)

In voir dire she said she would not consider a life sentence if defendant was convicted of killing three people:

> "Q: Could you also, given the fact that this is a case involving three young men who were killed and that you would have found that Mr. Flores killed them on

three separate occasions, could you honestly see yourself in that circumstance imposing a sentence of life without the possibility of parole?

A: Very honestly I believe that if a life was taken premeditated under those special circumstances, I feel that it would warrant the death penalty.

Q: And — all right. And you could not impose life without the possibility of parole? We need your honesty.

A: Right. Yes.

Q: You could not?

A: I could not.

Q: You could not?

A: I could say it depends on the circumstances and all the evidence and all that, but I guess I would go to the death penalty."

(6 RT 1375-76.)

Under questioning by the court, however, Ms. T. said she could consider life without the possibility of parole and would not "automatically" vote for death. (6 RT 1379.)

In comparison, prospective juror S.M. opposed the death penalty in general, but never wavered in stating he could impose it in the appropriate case. S. M. answered every question in the 37-page questionnaire. (18 CT 4910.) He was not categorically

opposed to the death penalty, but believed the "[d]eath penalty should be applied sparingly, to protect society and only in circumstances where an individual is beyond compunction *and* the crime is serious enough to warrant it." (18 CT 4938 [emphasis in original].) In his other responses, S. M. leaned towards opposing the death penalty for policy reasons. "I have reservations about its effectiveness to deter crime and its fairness," he wrote. (18 CT 4939.) Asked how he would vote in a hypothetical referendum to keep or abolish the death penalty, he stated he would vote to abolish it because it is not "an effective crime deterrent." (18 CT 4941.)

However, he said he would not "refuse" to find the defendant guilty, or the special circumstances true, in order to avoid having to make a decision on the death penalty. To the contrary, he wrote, "There are circumstances in which it should be applied." (18 CT 4939.) He affirmed he felt "very much" comfortable considering the statutory aggravating and mitigating factors before deciding upon the appropriate penalty to be imposed. (18 CT 4940.)

He said his religious beliefs taught him the death penalty

"should be applied sparingly and only for the most heinous crimes." (18 CT 4942.) He affirmed he would not always vote for life without parole over the death penalty. He stated, "I would weigh the evidence and the circumstances." (18 CT 4942.) He would be "reluctant" to vote for death or sign a death verdict," but not reluctant to state a verdict of death in open court. (18 CT 4943.)

When informed that in this case "three deaths occurred in three separate incidents," he answered he could consider both life without parole and the death penalty as "realistic and practical" possibilities. (18 CT 4944.) He concluded he could be a "fair and impartial juror" because he could "weigh evidence and judge the merits of the case." (18 CT 4945.)

Both sides questioned S. M. in voir dire. The prosecutor began, stating that "[y]ou indicated in your questionnaire that you don't know if you can be fair and impartial because it's a death penalty case." (5 RT 941.) S.M. disagreed. He said that he did not write that he "couldn't be fair and impartial, but that I'd be reluctant to impose the death penalty." (5 RT 941.) The prosecutor asked why he would be reluctant to "vote for death."

(5 RT 941.) S.M. replied, "While I'm not fundamentally opposed to the death penalty, you know, as a concept, I do have concerns about how it is imposed." (5 RT 942.) Specifically, he was concerned with the possibility of putting an innocent person to death, and he referred to the number of people who had been exonerated through DNA testing. He said, "I'm very uncomfortable with being placed with the responsibility of taking someone's life." (5 RT 942.)

The prosecutor asked if serving on a death penalty case would put him in a "moral dilemma." He said it would. (5 RT 942.) She asked if "would just rather not be in that position where you actually have to vote on death for other [sic] human being." He agreed that was correct. (5 RT 942.) The prosecutor said he appeared to be the "type of person that would probably try and do your darndest, but you feel because the death penalty is being sought in this case, that you don't think you'd be a good juror." He agreed. (5 RT 943.)

In response to questions from defense counsel, S.M. reiterated that he was "not fundamentally opposed" to the death penalty, but believed it should be reserved for "the most heinous

of crimes." (5 RT 943.) He did not think "a garden variety first degree murder would necessarily qualify for the death penalty [and he] would be inclined to vote life without parole." (5 RT 945.) He understood the court would give him criteria to consider in deciding whether to impose death; he affirmed he would be able to consider all the different factors, but allowed that "I don't know if I could in good conscience vote the death penalty." (5 RT 946.) He then repeated that he could vote for death in an "appropriate case." (5 RT 946.)

Thus, jurors who gave full-throated endorsement of the death penalty for this specific case were allowed to remain on the jury. In contrast to these jurors' express statement that they would impose death in this case, S.M. stated only once that he *did not know* if he could vote for death, but believed he could. (5 RT 946.) His limited opposition to the death penalty was a based on policy grounds, but the pro-death jurors were inclined to vote for death based on the specific facts of this case. The court questioned the pro-death jurors to rehabilitate them, and sometimes used leading questions. (5 RT 951, 5 RT 841, 6 RT 1379.) The court asked no questions of S.M. (5 RT 946-951.)

This uneven application of the *Witt* standard produced a jury "uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) The written questionnaire given to each prospective juror asked numerous questions about the juror's attitude towards the death penalty. Two questions in particular went directly to whether the prospective juror favored or opposed the death penalty.[1]

Question 130 asked how the juror would vote if there was a referendum "tomorrow" to keep or abolish the death penalty. Out of the 17 sworn jurors, 14 jurors said they would vote to keep the death penalty. Not one said he or she would vote to abolish it. One said he would not vote at all; two were not sure how they would vote.

Question 139 described five different attitudes about the death penalty and asked the prospective juror to indicate which attitude best described the juror's own feelings. Ten of the jurors put themselves in the group that favored the death penalty but would not impose it in all cases. Six put themselves in the group

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[1] See the sworn-juror questionnaires at 11 CT 2802 through 13 CT 3357.

that neither favored not opposed the death penalty. One put herself in the group that "had doubts" about the death penalty but would not vote against it in every case.

These questionnaire responses show that a high proportion of the jury favored the death penalty and had no reservations about imposing it. The trial court's uneven application of *Witt* contributed to this imbalance and undermined defendant's interest in a jury that represented a cross-section of the community. The result was a jury "uncommonly willing to condemn a man to die." (*Witherspoon, supra,* 391 U.S. at pp. 520-21.)

It is especially important in a capital case that the procedure for selecting the jury be free of bias. Imposing death in a capital case is a normative decision. Although the jury's discretion is guided by the enumerated circumstances in mitigation and aggravation, the weight each juror gives to those factors is discretionary and subjective. (See *People v. Boyde* (1988) 46 Cal.3d 212, 253 [holding a juror in a capital case is "free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted

to consider"].) If the accused is to be judged by a fair cross-section of the community, then the jury must be comprised not only of those who favor the death penalty and would apply it without hesitation, but also those who generally disfavor the death penalty and would apply it sparingly. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 460 (dis. opn. of Brennan, J.).)

The court's disparate treatment was an abuse of discretion that resulted in an unfair trial. The court violated defendant's rights to due process, to an impartial jury drawn from a fair cross-section of the community, and to a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. (See *Morgan v. Illinois, supra,* 504 U.S. at p. 727; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) Reversal of the conviction and sentence is required.

Conclusion

For the reasons stated above, and in the opening and reply briefs, the conviction and sentence must be reversed.

Date: 4/7/2014

Respectfully submitted,

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Word Count Certificate

The appellant's supplemental opening brief contains 2605 words, within the limit set forth in rule 8.630(d) of the California Rules of Court.

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CERTIFICATE OF SERVICE

I, Robert Derham, am an attorney admitted to the State Bar of California. My business address is 769 Center Boulevard #175, Fairfax, CA 94930. I am not a party to this action. On June _____, 2014, I served the **Supplemental Opening Brief** upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Anselmo, CA, in a sealed envelope, postage prepaid, and addressed as follows:

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